

(D)
91-304

Supreme Court, U.S.

FILED

AUG 5 1991

CLERK OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1991

LLOYD GRAMLING, CHIEF OF POLICE for the
CITY OF OKLAHOMA CITY,

Cross-Petitioner,

v.

RAYMON J. MELTON,

Respondent.

**Cross-Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Tenth Circuit**

CROSS-PETITION FOR WRIT OF CERTIORARI

JAMES G. HAMILL, OBA #3752
Municipal Counselor
*GERALD S. RAKES, OBA #7390
Assistant Municipal Counselor
The City of Oklahoma City
200 North Walker, Suite 309
Oklahoma City, Oklahoma 73102
(405) 297-2451

*Attorneys for Cross-Petitioner
Lloyd Gramling, Police Chief
for the City of
Oklahoma City, Oklahoma*

*Counsel of Record



QUESTIONS PRESENTED

- (1) THE TENTH CIRCUIT CREATED A STANDARD WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT WHEN IT DETERMINED THAT RESPONDENT HAD A PROPERTY INTEREST IN THE STATUS OF BEING A RETIRED POLICE OFFICER UNDER 11 O.S. § 50-125 AND THE DEPARTMENT OPERATIONS MANUAL.
- (2) THE TENTH CIRCUIT CREATED A STANDARD WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT WHEN IT DETERMINED THAT CHIEF GRAMLING WAS NOT ENTITLED TO QUALIFIED IMMUNITY IN THE DECISIONS REGARDING RESPONDENT'S STATUS AS A RETIRED POLICE OFFICER.

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City,¹ a municipal corporation; Lloyd A. Gramling, Chief of Police for The City of Oklahoma City; Gerald L. Emmett,² Assistant Chief of Police for The City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R., Chambless, Major, Oklahoma City Police Department; Carl Smith,³ Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride,⁴ Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to The City Manager, Defendant.

Oklahoma Municipal League, Inc. *amicus curiae*

¹ The City of Oklahoma City is a municipal corporation with no parent companies or subsidiaries to list pursuant to Rule 29.1. This petition for writ of certiorari pertains to judgment rendered against it. Except as noted herein, the remaining defendants have filed separate cross-petitions.

² Deceased.

³ Carl Smith received a defendant's verdict which was affirmed. The opinion rendered in favor of Melton in Appendix of petitioner, pp. 53-136, is not the subject of error by Melton in his petition.

⁴ The plaintiff's judgment against David McBride was reversed by the Tenth Circuit in the opinion reported in *Melton I*, petitioner's Appendix at 53, and is not the subject of error by Melton in his petition. McBride received a defendant's verdict on the First Amendment and Property Interest Due Process claims.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
CROSS-PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE.....	5
A. Factual Background	5
B. Proceedings Below.....	8
REASONS FOR GRANTING THE WRIT	11
I. THE TENTH CIRCUIT CREATED A STANDARD WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT WHEN IT DETERMINED THAT RESPONDENT HAD A PROPERTY INTEREST IN THE STATUS OF BEING A RETIRED POLICE OFFICER UNDER 11 O.S. § 50-125 AND THE DEPARTMENT OPERATIONS MANUAL.....	11
II. THE TENTH CIRCUIT CREATED A STANDARD WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT WHEN IT DETERMINED THAT CHIEF GRAMLING WAS NOT ENTITLED TO QUALIFIED IMMUNITY IN THE DECISIONS REGARDING RESPONDENT'S STATUS AS A RETIRED POLICE OFFICER	15
CONCLUSION	21

TABLE OF AUTHORITIES

	Page
CASES	
<i>Anderson v. Creighton</i> , 107 S.Ct. 3034 (1987).....	18
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972).....	12
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	6
<i>City of St. Louis v. Praprotnik</i> , 108 S.Ct. 915 (1988)	11
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) 16, 17, 19	
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974)	19, 20
<i>United States v. Page</i> , No. CR-83-73-R (W.D. Okla. filed April 6, 1983)	6
 CONSTITUTION	
First Amendment	3, 9
Fourteenth Amendment	3
 FEDERAL STATUTES	
18 U.S.C. §§ 1961-68	8
28 U.S.C. § 1254(1)	3
28 U.S.C. § 2101(c)	3
42 U.S.C. § 1983.....	4, 8
42 U.S.C. § 1985.....	8, 9
42 U.S.C. § 1988.....	8
 OKLAHOMA STATUTES	
Okl. Stat. Tit. 11, § 50-125 (Supp. 1991) ..	4, 11, 16, 19

TABLE OF AUTHORITIES – Continued

	Page
MISCELLANEOUS	
Rule 12.3 of the Supreme Court Rules	1, 3
Rule 13.5 of the Supreme Court Rules	1, 2
§ 1.01 of The Oklahoma City Police Code of Ethics	7
§ 5.05 of the Oklahoma City Police Department Operations Manual	13



No. _____

In The
Supreme Court of the United States
October Term, 1991

CITY OF OKLAHOMA CITY, et al.,

Cross-Petitioners

v.

RAYMON J. MELTON,

Respondent.

Cross-Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioner, former police chief of the City of Oklahoma City, Lloyd Gramling, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Tenth Circuit entered in this proceeding March 19, 1991, as authorized by Rules 12 and 13 of the Supreme Court Rules, 1990 revisions.

OPINIONS BELOW

On June 21, 1989, the Court of Appeals for the Tenth Circuit rendered an opinion on the consolidated appeals and cross-appeal from the United States District Court in

the Western District of Oklahoma, which affirmed in part and reversed in part the judgment of the district court on a jury verdict. The cross-petitioner and the other individual defendants filed separate petitions for rehearing with suggestion for in banc consideration. The June 21st opinion is reported at 879 F.2d 706 and is included in the Appendix of petitioner, pp. 53-136.

On November 3, 1989, the panel members of the Tenth Circuit Court denied the petitions for rehearing, but a majority of the Court's active judges agreed to rehear the cases in banc on four issues reported at 888 F.2d 724, and attached to the Appendix of petitioner, pp. 50-52. On March 19, 1991, an opinion in banc was filed, reported at 928 F.2d 920, and included in Appendix of petitioner, pp. 1-49. Judgment was entered the same day which vacated the portion of the judgment in which a violation of petitioner's liberty interest was found and remanded the matter to the district court to conduct other proceedings in accordance with the Tenth Circuit's opinion of June 21, 1989.

JURISDICTION

On June 13, 1991, petitioner filed a motion for extension of time to file a petition for writ of certiorari from the judgment of the Court of Appeals for the Tenth Circuit filed March 19, 1991. This was pursuant to Rule 13.5 of the Rules of the Supreme Court. This Court granted an extension until July 2, 1991, and at that time a petition for writ of certiorari was filed. The petition was received by cross-petitioner, Lloyd Gramling on July 5, 1991.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c) and Rule 12.3 of the Rules of the Supreme Court, and the cross-petition is filed within thirty days of the receipt of the petition for writ of certiorari.⁵

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States provides:

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section I of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of

⁵ This cross-petitioner has objected to the jurisdiction of the court to review a petition for writ of certiorari as required by Rules 13.4 and 15 of the Rules of the Supreme Court.

law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. Okla. Stat. Tit. 11, § 50-125 (West 1991 Supp.) provides:

§ 50-125. Retired officers – Retention of peace officer status – Emergencies

Members retired under the provisions of this article may retain their status as peace officers of the State of Oklahoma, retired, and as such may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement. Such retired members may in times of great emergency or danger serve in keeping with their availability and ability at the request of the Governor of Oklahoma or the mayor of their retirement municipality.

STATEMENT OF THE CASE

Plaintiff/Cross-Appellee/Petitioner/Respondent will hereinafter be referred to by name or as Respondent; Defendant, former Chief of Police of the City of Oklahoma City, Lloyd Gramling, and other party Defendants/Appellants/Cross-Petitioners will be referred to as "Gramling" or names of defendants, respectively.

A. Factual Background

Lt. Raymon Melton, a former detective for The Oklahoma City Police Department, was a friend of William C. Page, who had previously been an assistant district attorney and was currently a state district court judge in Oklahoma County, Oklahoma. Page was being prosecuted by the United States Attorney for the Western District of Oklahoma on charges of racketeering as a public official for actions taken while an assistant district attorney and afterwards as a sitting judge. He was convicted of racketeering and extortion.

Prior to Page's trial, Melton went to the federal courthouse for an interview about Page with the Assistant United States Attorney prosecuting the case. When this interview occurred, Melton was in the course and scope of his duties as a police officer. While this confidential interview was being conducted by a federal prosecutor and without the prosecutor's knowledge, Melton surreptitiously taped the conversation. Plaintiff later turned this taped interview over to defense counsel for Page and discussed the contents of the confidential interview with said counsel. Melton later testified for the defense in the criminal prosecution of Page. Although Melton testified

that he believed this taped conversation included exculpatory material which was required to be turned over to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), the criminal trial court in the Page trial determined that it did not. The trial judge in this civil case instructed the jury that it was *Brady* material. The federal district judge denied Page's motion to dismiss the criminal charges based upon the failure of the government to provide exculpatory material under *Brady*.⁶

Federal Bureau of Investigation Special Agent Ron West lodged a complaint with the City's Police Chief, Lloyd A. Gramling. As a result of this FBI complaint, Lt. Carl Smith of the police department conducted an internal affairs investigation of Melton at the request of Chief Gramling. At the beginning of the investigation, Lieutenant Smith provided Melton with a written notice informing Melton that an investigation of the FBI charges was being conducted. Melton was advised that the FBI had accused him of violating § 1.01 of The Oklahoma City Police Code of Ethics by revealing details of a confidential conversation with an Assistant United States Attorney to defense counsel for Page and of making perjured statements both in an affidavit and during his testimony in the criminal trial. Approximately four (4) weeks later, on September 8, 1983, Gerald L. Emmett, Assistant Chief of Police, gave notice to Melton that the Review Board would convene on September 13, 1983, to decide on

⁶ Page was convicted of racketeering and extortion on July 29, 1983. *United States v. Page*, No. CR-83-73-R (W.D. Okla. filed April 6, 1983), aff'd, 808 F.2d 723 (10th Cir.), cert. den., U.S. 918 (1987).

Melton's future with the police department as a result of the internal affairs investigation.

The Departmental Review Board convened on the scheduled date and Melton was advised by Chairman Emmett's opening remarks that the allegations of federal perjury had been dropped and the Board would only deal with the alleged breach of the Code of Ethics.

The pertinent portion of § 1.01 of the Oklahoma City Police Code of Ethics provides:

I will be exemplary in obeying the laws of the land and the regulations of my Department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

Lt. Melton appeared before the Board and freely admitted to the members that he had secretly taped his interview with the federal prosecutor and turned the recorded tape over to Page's legal counsel.

The Board members voted six to one to sustain the charge that Melton had committed a serious violation of the Code of Ethics by his conduct in secretly taping a confidential interview with an Assistant U.S. Attorney and by turning this tape over to the criminal defense counsel. The Board also voted to recommend to the Police Chief that Melton be terminated from employment with the police department. There was never any consideration by the Board that the Code of Ethics was violated by virtue of Melton's appearance as a witness at the criminal trial.

The findings of the Board were submitted to Police Chief Gramling, who consulted with the City Manager and received his approval for the proposed personnel action. Gramling subsequently terminated Melton by letter written September 13, 1983. Subsequent to his termination, Melton was granted retirement pension benefits under the State Police Pension System due to the length of his service with the police department. This was done without objection of The City.

Chief Gramling, in a letter following Melton's dismissal, advised Melton that due to the unmeritorious retirement he did not "retain the privilege or approval to bear firearms or otherwise represent yourself as a commissioned officer of The Oklahoma City Police Department, as provided by State Law 11 O.S. 50-125."

With respect to other factual background information surrounding this case, cross-petitioner would adopt the statement of facts contained in its brief in opposition to a petition for writ of certiorari.

B. Proceedings Below

Plaintiff sued The City of Oklahoma City, the police chief, and seven defendant employees of The City under 42 U.S.C. §§ 1983, 1985 and 1988, and 18 U.S.C. §§ 1961-68 alleging he was wrongfully terminated as a police officer and was deprived of his liberty and property rights without due process of law, that the defendants engaged in a criminal conspiracy under RICO., and that his discharge was a retaliation for the exercise of his First Amendment Rights. On February 4, 1985, a jury verdict was rendered against some of the defendants in a total amount of

\$1,272,000 in actual damages and a total of \$28,200 in punitive damages. The trial court directed a verdict as to all defendants on Melton's RICO claim.

A verdict on the § 1985(2) claims was rendered in favor of all the defendants. Carl Smith received a defendant's verdict and he filed for an award of attorney's fees. Police spokesperson David McBride was given a defendant's verdict on the First Amendment claim and the property interest due process claim. Punitive damages were stricken by the trial court when it partially granted defendants' J.N.O.V. Motion.

The defendants filed a motion for new trial which was denied. The City of Oklahoma City and the individual defendants appealed the judgment of the trial court for the Western District of Oklahoma, including the denial of attorney fees to Defendant Smith. The appeals were consolidated. Melton cross-appealed on the issues of the defendants' verdict on the RICO charges and the J.N.O.V. striking punitive damages.

On June 21, 1989, the panel of the Tenth Circuit Court of Appeals rendered an opinion on this consolidated appeal. In its opinion, the Court:

- (1) Reversed the jury verdict on the First Amendment claim and remanded for a new trial as to the individual defendants on the issue of whether Lt. Melton's trial testimony was a substantial motivating factor in his discharge. (As to The City, the Court affirmed the jury verdict of \$50,000.);
- (2) With respect to defendants' liability on Lt. Melton's deprivation of property claims on continued employment, ordered the trial court to direct a verdict for the individual

cross-petitioners. The appellate court directed a verdict for petitioner on the retirement status property interest claim. The matter was remanded to the trial court to determine if Gramling was acting as a final policy maker or if a final policy maker for the City had ratified Gramling's acts.

- (3) With respect to the liberty interest claims, affirmed the verdict against all cross-petitioners except McBride;
- (4) Affirmed the verdict against the City on petitioner's First Amendment claim;
- (5) Affirmed the J.N.O.V. as to the punitive damage issue;
- (6) Affirmed the denial of Smith's request for attorneys' fees.

On March 19, 1991, the opinion on the rehearing in banc and judgment were rendered the same day. The in banc court:

- (1) Affirmed the judgment of the district court in part and reversed in part;
- (2) Vacated all the judgments as to the liberty interest claims against the remaining defendants, and remanded to the district court with orders to enter judgment for these defendants on this claim;
- (3) Further ordered the trial court to conduct other proceedings in accordance with the Tenth Circuit's opinion of June 21, 1989.

The jurisdictional statement details the proceedings occurring since the judgment of March 19, 1991, was entered.

REASONS FOR GRANTING THE WRIT

I.

THE TENTH CIRCUIT CREATED A STANDARD WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT WHEN IT DETERMINED THAT RESPONDENT HAD A PROPERTY INTEREST IN THE STATUS OF BEING A RETIRED POLICE OFFICER UNDER 11 O.S. § 50-125 AND THE DEPARTMENT OPERATIONS MANUAL.

The Tenth Circuit affirmed a ruling against Chief Gramling that he had deprived the Respondent of a protected property interest in his status as a retired police officer. Upon remand, the trial court has been directed to determine first whether Gramling's actions were those of a final policy maker and attributable to the City of Oklahoma City under *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), and then the damages suffered by the Respondent.

The primary origin of this protected property right is alleged to be 11 O.S. § 50-125, which states:

Members retired under the provisions of this article may retain their status as peace officers of the State of Oklahoma, retired, and as such may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement. Such retired members may in times of great emergency or danger serve in keeping with their availability and ability at the request of the Governor of Oklahoma or the mayor of their retirement municipality.

Careful reading of the cited statute clearly shows that it is permissive in several aspects and that the status is subject to the approval by the officials of the municipality

from which the officer retired. The statute does not mandate that such officers retain their status as retired officers in the absence of just cause to deny it. No standard is established within the statute regarding when approval may be granted or withheld by the municipal officials. The statute leaves the decision solely to the discretion of the municipal officers. Police Chief Lloyd Gramling is the municipal official who made the decision in the case at bar.

The decision of the circuit court sets a new standard for determining property rights. The Supreme Court, in *Board of Regents v. Roth*, 408 U.S. 564 (1972), stated:

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim or entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. (408 U.S. at 577)

The statute which the circuit court determined to have created a property interest shows no legitimate claim of entitlement to any rights in the status of being a retired peace officer. Clearly, any rights which the officer may acquire under the statute could be acquired only upon the approval of the officials of the municipality from which he was retiring. The statute provided no limitations on the discretion of the officials in their decision to either approve or disapprove the officer's status as a retired peace officer.

The decisional law of Oklahoma does not reveal any case wherein it was determined that the statute created a property interest in this status as a retired officer. In fact, with the exception of an opinion of the Oklahoma Attorney General interpreting the statute on an unrelated issue, there is no record that the statute has ever been interpreted by any Oklahoma court. From his advice to Gramling, it is clear that the assistant municipal attorney did not read the statute as having created any type of protected property right in this status as a retired peace officer, nor is such a reading reasonable under the circumstances. There is no support for the decision of the circuit court that the statute created a property right and that municipal official's decision to grant or deny the status could be reached only after a due process hearing.

Another source from which the circuit court determined there existed a property interest in this retired officer status was § 5.05 of the Oklahoma City Police Department Operations Manual. That section read as follows:

All sworn personnel retiring with twenty years of service may retain the police badge which is

in their possession at time of retirement. Sworn personnel retiring with less than twenty years of service may retain their badge at the discretion of the Chief of Police.

While the use of the term "may" appears permissive, it is arguable that as applied to retiring officers with more than twenty (20) years service, the section in question creates some right. However, analysis of the instructions given the jury in the trial of this matter reveal that this information, although admitted into evidence, was never considered as a ground upon which a property right could be found by the parties in the case.

There are only two references in the jury instructions to a property right in an officer's status as a retired peace officer. In instruction 3 it states, in relevant part:

Plaintiff contends that he has been deprived of his civil rights as follows:

(2) That he was denied property interests in his continued employment as a police officer and the ability to represent himself as a retired commissioned police officer without due process of law.

Also, in instruction 6, the relevant portion states:

You are further instructed that, under the laws of the State of Oklahoma, retired police officers may retain their status as peace officers of the State of Oklahoma, retired. An officer who retains such status may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement.

Only those two portions of the jury instructions dealt with the issue of whether the Respondent had a property interest in his status as a retired police officer. Neither of

those instructions mentioned any rights to retain a badge upon retirement. The jury was not instructed to consider this evidence in its deliberations on the property right issue and it is inappropriate for the circuit court to use this to justify it's holding.

II.

THE TENTH CIRCUIT CREATED A STANDARD WHICH CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT WHEN IT DETERMINED THAT CHIEF GRAMLING WAS NOT ENTITLED TO QUALIFIED IMMUNITY IN THE DECISIONS REGARDING RESPONDENT'S STATUS AS A RETIRED POLICE OFFICER.

Gramling's decision regarding Petitioner's status was made after the Chief had received the findings and recommendations of the Police Disciplinary Review Board in which it had been admitted by Petitioner that he had surreptitiously recorded a conversation between an assistant United States Attorney and the Petitioner concerning a pending criminal matter and turned the tape of that conversation over to the defendant's counsel. The Review Board found that this action of Petitioner constituted a violation of the Code of Ethics of a police officer and recommended that he be terminated from the department. The Petitioner's actions brought discredit upon the Oklahoma City police department and undermined working relationships with other law enforcement entities in the area. Under those circumstances, the Chief exercised his discretion under the statute when he considered it inappropriate for the Petitioner to be allowed to continue to carry a firearm and hold himself out as a retired Oklahoma City police officer.

Prior to reaching this decision, the Chief consulted with the assistant municipal attorney then assigned to advise the police department. This was done in an effort to insure that any rights which the Petitioner might have in this status as a retired police officer were considered prior to the decision. The attorney advised the Chief that the decision to deny Petitioner the right to keep and bear firearms or hold himself out as a retired officer was within the sound discretion of the Chief.

As previously noted, there was and is no decisional case law by any court of Oklahoma interpreting the provisions of 11 O.S. § 50-125. This case represents the sole attempt by any court to analyze this statute and render a decision regarding the rights, if any, that are created it.

The Supreme Court, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), stated:

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was

clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. (457 U.S. at 817-818) (Citations omitted)

While the cited language is significant, a more telling statement is found in footnote 31 of *Harlow*, which states:

This case involves no claim that Congress has expressed its intent to impose "no fault" tort liability on high federal officials for violations of particular statutes or the Constitution.

Governmental officials are entitled to qualified immunity from tort liability except in those circumstances where the law is so clearly established that a reasonable man would know or should have known that his actions would violate the rights of an individual. There is no expression of legislative intent to impose "no fault" liability on the administrative police officials tasked with determining when a retiring officer should be denied the right to continue to bear arms.

The circuit court found that the constitutional right to due process prior to depriving an individual of a property right was well established and used that as it's basis for denying qualified good faith immunity to the cross-petitioner. This analysis ignores the threshold question of whether the statute upon which the Petitioner bases his property right in the status of being a retired peace officer so clearly established that right that a reasonable person knew or should have known that the right existed. Chief

Gramling has no quarrel with the Tenth Circuit's determination that it was clearly established law that a person may only be deprived of a property right after notice and a hearing sufficient to provide due process. However, looking at the permissive, non-mandatory language of the statute which the circuit court relied upon as the source of this property right, it is unrealistic to say that any reasonable man would or could have known that any type of property right was created by that statute. This situation is aggravated by the fact that no other court has interpreted the statute at all, much less as having created an enforceable property right.

Further evidence of the problem is found in the original three judge panel decision of the Tenth Circuit. While the majority found the creation of a property interest, a highly experienced federal appeals court judge could find no property interest under his analysis of the operative statute. Petitioner Gramling, although a police officer with over thirty (30) years experience at the time of the events in question, has no formal legal training in the interpretation of state statutes. He relied on the advice of counsel, whose analysis mirrored that of the minority in the initial appellate decision. To say that under such circumstances it is appropriate to deny qualified immunity and leave the Petitioner to remain personally liable to the Respondent is insupportable.

This analysis is supported by *Anderson v. Creighton*, 107 S.Ct. 3034 (1987), which states:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent. (Citations omitted)

The permissive nature of the statute makes it impossible to state definitively that the statute creates a property right in the status of a retired police officer. It can't be said that the contours of the right in question were sufficiently clear to eliminate the cross-petitioner's qualified immunity.

The standard for determining when qualified immunity is available under such circumstances is objective reasonableness. *Harlow v. Fitzgerald*, 457 U.S. 800 at 815-818 (1982). Under the facts of the case at bar, the cross-petitioner's actions were both objectively and subjectively reasonable. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Chief Gramling made a good faith attempt to determine what rights, if any, were created by 11 O.S. § 50-125. There were and are no court decisions interpreting that statute. The Chief took the reasonable alternative of consulting with the assistant municipal attorney assigned to advise him prior to making a decision on the Respondent's status under the statute. There is no evidence which would indicate that the Chief acted out of animus or malice towards the Respondent in this decision. Instead the decision was reached following the Review Board's determination that Respondent had violated the Code of Ethics by his actions and recommendation that he be terminated from the department.

The Chief had been advised that there had developed a reluctance by other law enforcement agencies to communicate with the Oklahoma City Police Department. (Tr. Vol. V. P. 904) This reluctance was apparently based on the perception that the actions of the Respondent in secretly taping a conversation with the assistant U.S. attorney about a pending criminal matter and turning the tape over to the defense counsel may be wide-spread through the department. Other law enforcement agencies were understandably hesitant to share confidential information under such circumstances.

The situation appears to parallel exactly that which the Supreme Court was addressing in *Scheuer*, supra, when it stated:

Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity — absolute or qualified — for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. (416 U.S. at 241-242) (Footnote omitted)

The Chief's decision in denying Petitioner the right to keep and bear firearms and otherwise hold himself out as a retired Oklahoma City police officer was designed to assure outside officials that Petitioner's actions did not represent department policy and were not condoned. The Chief's actions were taken in good faith, without malice in the performance of his duties as Chief of Police of

Oklahoma City. The actions taken were in the best interests of the department to help maintain open lines of communication between local law enforcement agencies. They were taken within the scope of the Chief's employment and did not violate clearly established statutory or constitutional rights of which a reasonable person would or should have been aware.

The Tenth Circuit's decision denying qualified immunity is in conflict with the decisions of the Supreme Court and should be reversed.

CONCLUSION

If the Court determines it appropriate to grant the petition for writ of certiorari filed by Melton, it should also grant the cross-petition herein and address the issues of statutory misinterpretation and the denial of qualified immunity.

Respectfully submitted

JAMES G. HAMILL
Municipal Counselor
GERALD S. RAKES, OBA #7390
Assistant Municipal Counselor
The City of Oklahoma City
200 North Walker, Suite 309
Oklahoma City, Oklahoma 73102
(405) 297-2451

*Attorneys for Cross-Petitioner
Lloyd Gramling, Police Chief
for the City of
Oklahoma City, Oklahoma.*